

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT PETKOFF)	
Claimant)	
VS.)	
)	Docket No. 187,137
ELIASON & KNUTH)	
Respondent)	
AND)	
)	
LUMBERMEN'S UNDERWRITING ALLIANCE)	
Insurance Carrier)	

ORDER

Claimant requested review of the Award dated December 31, 1996, entered by Special Administrative Law Judge Michael T. Harris. The Appeals Board heard oral argument on May 20, 1997, in Kansas City, Kansas.

APPEARANCES

Keith L. Mark of Mission, Kansas appeared for the claimant. Renana B. Abrams of Kansas City, Missouri, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument, the parties agreed claimant had not utilized his unauthorized medical benefits.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a 5 percent whole body functional impairment. Claimant requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

The parties agreed claimant injured his back on or about November 12, 1993, while working for the respondent as a union carpenter. The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 5 percent whole body functional impairment. Claimant requested this review and contends he has established a work disability.

Three physicians testified as to the nature of claimant's injury. Claimant's expert medical witness, Edward J. Prostic, M.D., a board-certified orthopedic surgeon, testified that according to x-rays claimant had disc space narrowing and posterior facet arthrosis at the L5-S1 intervertebral space and that those abnormalities were permanently aggravated by claimant's work-related accident. Dr. Prostic rated claimant as having a 7-10 percent permanent partial whole body functional impairment and believed that claimant should observe permanent medical restrictions.

Respondent's medical expert witness, Ernest Neighbor, M.D., also a board-certified orthopedic surgeon, testified claimant had no objective findings indicating permanent impairment and that claimant had sustained no permanent injury as a result of the November 1993 accident.

An administrative law judge appointed P. Brent Koprivica, M.D., to evaluate claimant. The doctor saw claimant in February 1995 and diagnosed chronic lumbosacral sprain which constituted a 5 percent whole body functional impairment. In his initial report to the administrative law judge, Dr. Koprivica indicated permanent medical restrictions were unnecessary. However, at his deposition in August 1995, the doctor testified claimant was unable at that time to return to work and perform some of the heavy physical labor required of a carpenter because he was deconditioned. Until such time as claimant has completed a work hardening or reconditioning program, Dr. Koprivica believes claimant should observe the following work restrictions and limitations: limit work activities to the medium physical demand level and avoid repetitive bending, stooping, crawling, pushing, pulling, and twisting.

After considering the testimony of the three doctors, the Appeals Board agrees with the Special Administrative Law Judge that claimant has sustained a 5 percent whole body

permanent partial functional impairment. The Appeals Board finds Dr. Koprivica's testimony more persuasive than that of the other doctors.

Because claimant has sustained an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds claimant did not prove the tasks loss percentage as required by the above-quoted statute. Claimant did not provide a list of specific tasks that he performed over the 15-year period before the November 1993 accident. Instead, he presented a one-page document that indicated his job tasks were those of a carpenter. That document was marked and admitted into evidence as Claimant's Exhibit 1 to the regular hearing. However, during cross-examination at his deposition, claimant testified he had performed numerous activities as a carpenter including, among other things, plastering, metal stud framing, drywall installation in both residential and commercial settings, house construction, door installation, finish work, ceiling installation, insulation installation, topping walls, framing walls, styrofoam installation, expansion joint installation, and drywall channel installation. The record does not indicate whether those activities are specific work tasks or a general description of activities that should be further broken down into tasks. It appears several of the activities fall into the latter category.

At Dr. Koprivica's deposition, claimant's counsel asked the doctor to read pages 30 through 36 of claimant's deposition and provide an opinion of claimant's tasks loss as a result of the November 1993 accident. The doctor reviewed the specified pages of the transcript and provided his opinion that claimant could not at that time perform 67 percent of his former tasks. However, not all of the activities or tasks brought out at claimant's deposition were contained in the pages Dr. Koprivica was asked to consider. At Dr. Prostic's deposition, the doctor indicated claimant was unable to return to the work generally described in Claimant's Exhibit 1 to the regular hearing, mentioned above. Dr. Prostic did not otherwise indicate what tasks claimant could or could not now perform.

The Appeals Board finds neither Dr. Koprivica nor Dr. Prostic was given an appropriate list of tasks which claimant performed over the 15-year period before the date of accident. Because claimant has failed to prove through the opinion of a physician the percentage of tasks he is no longer able to perform as a result of the November 1993 accident, the Appeals Board finds the percentage of tasks loss for the first prong of the formula set forth in K.S.A. 44-510e should be considered nil.

For the second prong of the permanent partial general disability formula, the Appeals Board finds there is a 100 percent difference in pre- and post-injury wages. At the time of the regular hearing in June 1995 claimant was not working. However, claimant was in the National Guard, of which he had been a member since 1990, and presumably earning a similar wage from those activities as he was before the accident.

After initially recovering somewhat from his injury, claimant returned to work for the respondent for approximately two days and was terminated after complaining the work aggravated his back. Because his work experience was principally limited to carpentry and because he did not believe he could find other employment which would pay wages comparable to the \$700 per week he had been earning while working for the respondent, claimant returned to college to complete a communications degree. There is no evidence to establish that respondent has offered claimant either employment or vocational rehabilitation services after terminating him. However, there is evidence respondent and its insurance carrier refused to provide a work hardening program which had been prescribed by one of claimant's doctors in hopes of returning claimant to carpentry work.

As required by K.S.A. 44-510e, the Appeals Board must average the 0 percent tasks loss and 100 percent wage difference and, thus, finds claimant has a 50 percent permanent partial general disability upon which his award should be based.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered December 31, 1996, by Special Administrative Law Judge Michael T. Harris should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robert Petkoff and against the respondent, Eliason & Knuth, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred November 12, 1993, and based upon an average weekly wage of \$700 for 207.5 weeks at the rate of \$313 per week for a 50% permanent partial general body impairment of function, making a total award of \$64,947.50.

As of July 18, 1997, there is due and owing claimant 192 weeks of permanent partial disability compensation at the rate of \$313 per week in the sum of \$60,096 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,851.50 is to be paid for 15.5 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Renana B. Abrams, Kansas City, MO
Michael T. Harris, Special Administrative Law Judge
Philip S. Harness, Director